OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 4 September 2008 [1]

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I — Introduction

1. The present case arises from a reference for a preliminary ruling submitted by the Bundesgerichtshof (Federal Court of Justice, Germany) in accordance with Article 234 EC by which that national court asks the Court of Justice five questions regarding the interpretation of the principle of non-contractual liability of Member States for breach of Community law.

2. Those questions arise in the context of a legal dispute between Danske Slagterier, an industry association of Danish slaughterhouses and pig farmers organised in the form of cooperatives ('the claimant'), and the Bundesrepublik Deutschland (Federal Republic of Germany; 'the defendant'), in which the claimant seeks damages on account of the incorrect transposition of Directives 64/433/EEC — as reenacted by Directive 91/497/EEC [2] — and 89/662/EEC. [3]

3. In essence, those questions concern the requirements for a State liability claim under Community law, a potential obligation on the injured party seeking legal redress to avert loss and damage, and the application of limitation periods — a matter which in principle is in the domain of national law.

2 — Council directive of 29 July 1991 amending and consolidating Directive 64/433/EEC on health problems affecting intra-Community trade in fresh meat to extend it to the production and marketing of fresh meat (OJ 1991 L 268, p. 69).

3 — Council directive of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13).

II — Legal framework

A — *Community law*

4. Article 5 of Directive 64/433 as reenacted by Directive 91/497 provides:

'1. Member States shall ensure that the official veterinarian declares unfit for human consumption:

…

(o) meat which gives off a pronounced sexual odour.'

5. Article 6 of Directive 64/433 states:

'1. Member States shall ensure that:

…

(b) meat from:

…

(iii) without prejudice to the cases provided for in Article 5(1)(o) uncastrated male pigs with a carcase weight in excess of 80 kilograms, except where the establishment is able to guarantee by means of a method recognised by the procedure laid down in Article 16, or in the absence of such a method by a method recognised by the competent authority concerned, that carcases giving off a pronounced boar taint may be detected, bears the special

mark provided for by [Commission] Decision 84/371/EEC [of 3 July 1984 establishing the characteristics of the special mark for fresh meat referred to in Article 5(a) of Directive 64/433/EEC (OJ 1984 L 196, p. 46)] and undergoes one of the treatments provided for in [Council] Directive 77/99/EEC [of 21 December 1976 on health problems affecting intra-Community trade in meat products (OJ 1977 L 26, p. 85), as last amended by Directive 89/662];

…

(g) the treatment provided for in the preceding points is carried out in the establishment of origin or in any other establishment designated by the official veterinarian;

…'

6. Article 5 of Directive 89/662 provides:

'1. Member States of destination shall implement the following measures:

(a) The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport.'

7. Article 7 of Directive 89/662 states:

'1. If, during a check carried out at the place of destination of a consignment or during transport, the competent authorities of a Member State establish,

…

(b) that the goods do not meet the conditions laid down by Community directives, or, in the absence of decisions on the Community standards provided for by the directives, by national standards, they may, provided that health and animal-health considerations so permit, give the consignor or his representative the choice of:

— destroying the goods, or

— using the goods for other purposes, including returning them with the authorisation of the competent authority of the country of the establishment of origin.'

8. Article 8(1) of Directive 89/662 provides:

'In the cases provided for in Article 7, the competent authority of the Member State of destination shall contact the competent authorities of the Member State of dispatch without delay. The latter authorities shall take all necessary measures and notify the competent authority of the first Member State of the nature of the checks carried out, the decisions taken and the reasons for such decisions.'

B — *National law*

9. The German Civil Code (Bürgerliches Gesetzbuch) in the version applicable until 31 December 2001 ('the old version of the BGB') contained the following provisions:

'Paragraph 195

The general limitation period shall be 30 years.'

'Paragraph 839

(1) If an official wilfully or negligently breaches the official duty incumbent upon him as against a third party, he shall compensate the third party for the damage arising therefrom. If the official is only negligent, a claim can be made against him only if the injured party is unable to obtain compensation in another way.

(2) If an official commits a breach of official duty in giving judgment in legal proceedings, he shall be liable for the damage arising therefrom only if that breach of duty constitutes a criminal offence. This provision shall not apply to a wrongful refusal to exercise official duties or to a wrongful delay in exercising them.

(3) The obligation to compensate shall not arise if the injured party has wilfully or negligently failed to avert the damage by utilising a legal remedy.'

'Paragraph 852

(1) The limitation period in respect of a claim for compensation for damage that has arisen from an unlawful act shall expire three years from the date on which the injured party became aware of the damage and of the identity of the person liable to pay compensation and, irrespective of any such awareness, 30 years from the date on which the unlawful act was committed.

(2) If negotiations on the amount of compensation payable have commenced between the person liable to pay the compensation and the person entitled to it, the limitation period shall be suspended until one or other of the parties refuses to continue the negotiations.

(3) If through his unlawful act the person liable to pay compensation has acquired anything to the injured party's detriment, he shall be required even after the expiry of the limitation period to make restitution in accordance with the provisions on restitution in the case of unjust enrichment.'

III — Facts, main proceedings and questions referred for a preliminary ruling

10. The claimant seeks, on the basis of a right assigned by its members, damages from the defendant on account of an infringement of Community law. It alleges that from the beginning of 1993 to 1999 the defendant imposed a de facto import ban on meat from uncastrated male pigs from Denmark, as a result of which its members suffered loss amounting to at least DEM 280 000 000.

11. Uncastrated male pigs were bred in Denmark as animals for slaughter from the beginning of the 1990s. When heated, their meat can have a strong odour or taste. In order to be able to detect and reject meat tainted with the odour, skatol, a degradation product formed in the intestine, was measured in the

course of the slaughter process. In the view of the defendant, however, the odour can be attributed to the hormone androstenone, whilst the examination of skatol content does not produce any reliable results.

12. Under Article 5(1)(o) of Directive 64/433 as reenacted by Directive 91/497, Member States must ensure that the official veterinarian declares unfit for human consumption meat which gives off a pronounced sexual odour. Under Article 6(1)(b)(iii), Member States must ensure that, without prejudice to the cases provided for in Article 5(1)(o), meat from uncastrated male pigs with a carcase weight in excess of 80 kilograms bears a special mark and undergoes a heat treatment, except where the establishment is able to guarantee by means of a recognised method that carcases giving off a pronounced boar taint may be detected.

13. By notes of 18 and 26 January 1993, the defendant informed the highest veterinary authorities of the Member States that Article 6(1)(b) of Directive 64/433 had been implemented in Germany with a limit level of 0.5 μg/g for androstenone, irrespective of weight limit; if that level was exceeded the meat was unfit for human consumption within the meaning of Article 5(1)(o) and could not be imported into Germany as fresh meat. The notes also stated that all consignments of pigmeat from other Member States, irrespective of any marking attesting to hygiene standards, would be inspected at the place of destination pursuant to Article 7(1)(b) of Directive 89/662 to check whether the limit level had been complied with. Subsequently, numerous shipments of pigmeat from Denmark were therefore checked by the competent German authorities and, if the androstenone limit was exceeded, objected to and rejected.

14. Following an action brought by the Commission, the Court held by judgment of 12 November 1998 in Case C-102/96 *Commission* v *Germany* [1998] ECR I-6871 that the defendant had infringed the abovementioned provisions of the directives.

15. The claimant bases its claim for damages on the assertion that in the light of the defendant's conduct, which was contrary to Community law, the Danish pig farmers and slaughterhouses had first reduced, and in October 1993 almost completely ceased, production of uncastrated male pigs. Instead, from 1993 to 1999 around 39 million castrated pigs were reared and slaughtered for marketing in Germany. Marketing a corresponding quantity of uncastrated pigs would have produced cost savings of at least DEM 280 000 000.

16. The claimant's action of 6 December 1999 for an order for payment was upheld by the Landgericht (Regional Court) on the merits for the period commencing on 7 December 1996 and dismissed as time-barred in so far as it concerned claims for damages in respect of loss arising in the period to 6 December 1996. The appellate court upheld the entire claim on the merits. In the appeal on points of law, for which that court gave leave, the defendant seeks to have the claim dismissed in its entirety.

17. The Bundesgerichtshof, as the court seised with the appeal on points of law, takes the view that the present case raises the issue of the extent to which, following infringement of harmonising directives, the pigmeat producers and distributors concerned may potentially rely on rights which are conferred on them by primary law. Moreover, in its view, clarification is needed on the influence of Community law principles on the elaboration — which is in principle a matter for national law — of the detailed rules governing claims seeking to establish State liability under Community law, in particular in relation to the limitation period for such a claim and the legal consequences of any breach of the obligation to avert damage by having recourse to legal remedies ('the primacy of primary legal protection').

18. Therefore, on 12 October 2006, it ordered that the defendant's appeal be stayed and that the following questions be referred to the Court for a preliminary ruling:

'(1) Do Article 5(1)(o) and Article 6(1)(b)(iii) of Council Directive 64/433/EEC of 26 June 1964 on health problems affecting intra-Community trade in fresh meat, as reenacted by Council Directive 91/497/EEC of 29 July 1991 (OJ 1991 L 268, p. 69), in conjunction with Article 5(1), Article 7 and Article 8 of Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13) place producers and distributors of pigmeat in a legal position which can give rise to a claim seeking to establish State liability under Community law in the event of errors of transposition or application?

(2) May the producers and distributors of pigmeat — irrespective of the answer to the first question — rely on an infringement of Article 30 of the EC Treaty (Article 28 EC) in order to substantiate a claim seeking to establish State liability under Community law where the transposition and application of the abovementioned directives are contrary to Community law?

(3) Does Community law require the limitation period for a claim seeking to establish State liability under Commu-

nity law to be interrupted in the light of Treaty infringement proceedings under Article 226 EC or at any rate to be suspended pending the end of those proceedings where there is no effective domestic legal remedy to compel the Member State to transpose a directive?

(4) Does the limitation period for a claim which seeks to establish State liability under Community law and is based on the inadequate transposition of a directive and an accompanying (de facto) import ban commence, irrespective of the applicable national law, only with the full transposition of the directive, or can the limitation period begin to run, in accordance with national law, when the first injurious effects have already been produced and further injurious effects are foreseeable? If full transposition has a bearing on the commencement of the limitation period, is this true in general or only if the directive confers a right on individuals?

(5) Given that the Member States may not frame the conditions for reparation of loss and damage in respect of claims seeking to establish State liability under Community law less favourably than those relating to similar domestic actions and it may not be made in practice impossible or excessively difficult to obtain reparation, are there, generally, objections to a national rule under which an obligation to pay compensation does not arise if the injured party has wilfully or negligently failed to avert the damage by utilising a legal remedy? Are there also objections to this "primacy of primary legal protection" where it is subject to the proviso that it must be reasonable for the party concerned? Is the fact that the relevant court is likely to be unable to answer the questions of Community law at issue without making a reference to the Court of Justice of the European Communities or that Treaty infringement proceedings under Article 226 EC are already pending sufficient to make it unreasonable under European Community law?'

IV — Procedure before the Court

19. The order for reference was lodged at the Court Registry on 6 November 2006.

20. Within the period laid down by Article 23 of the Statute of the Court of Justice written observations were lodged by the claimant in

the main proceedings, by the German, Greek, Polish, French, Czech and Italian Governments and by the Commission.

21. At the hearing on 21 May 2008, the representatives of the claimant in the main proceedings, the German, Greek, Polish, French, Italian and United Kingdom Governments and the Commission presented oral submissions.

V — Main arguments of the parties

A — *First question*

22. The *German Government* takes the view, shared by the *Greek, Polish, French* and *Italian Governments*, that neither Article 5(1)(o) in conjunction with Article 6(1)(b) of Directive 64/433 nor Articles 5, 7 and 8 of Directive 89/662 confer individual rights on producers and distributors of pigmeat, with the result that — on this view — the first of the three conditions for State liability arising from the incorrect transposition of the directives concerned is not satisfied.

23. In support of that submission, the abovementioned parties essentially argue that — as follows, in their view, in particular from the recitals in the preamble to Directives 64/433 and 89/662 — the purpose of those directives was to remove veterinary obstacles hindering the internal market, to be specific by, first, harmonising the basic requirements relating to the safeguarding of public and animal health and, second, abolishing internal frontier checks. Article 5(1)(o) and Article 6(1)(b) of Directive 64/433 were aimed at safeguarding consumer health and the harmonisation of the relevant checks. Articles 5(1), 7 and 8 of Directive 89/662 required Member States, in the context of health checks, to recognise that products checked in the Member State of dispatch were fit for human consumption and, if their assessment differed, to have recourse to the procedure established by the directive.

24. The *German Government* stresses the fact that, in contrast to the directives at issue in *Francovich and Others* (cited in footnote 5) and *Dillenkofer and Others* (cited in footnote 9), Directives 89/662 and 64/433 — which are at issue in the present proceedings — do not identify at any point a definable group of persons which is to be entitled to specific rights. In its view, the mere proximity of a particular group of persons to the subject-matter of the directives is insufficient to justify an assumption that individual rights are granted.

25. The *claimant* in the main proceedings, the *Commission* and the *Czech Government* take the view that the producers and distributors of pigmeat hold an individual right protecting them against checks more far-reaching than those permitted under the directives. In that connection, the claimant stresses the fact that Member States are precluded from imposing marketing conditions which are more onerous than those permitted under Article 6 of Directive 64/433. Article 8 of Directive 89/662 precludes the national authorities from applying the provisions of Article 7 thereof unless a dispute resolution procedure is implemented. In that way, an individual is recognised as having a right to be spared the measures which the Member State of destination may impose under Article 7. The claimant contends that the purpose of Article 5(1)(o) of Directive 64/433 is to ensure that the determination on fitness for human consumption is, in principle, made in the State of origin. That provision aims, therefore, to protect individuals against national practices which exceed the limits imposed by the directive.

26. The *Commission* makes reference in its written observations to Case C-102/96 *Commission* v *Germany*[4] in which the infringement of Directives 64/433 and 89/662 at issue here was established. The Commission contends that the aim pursued by the material provisions of those directives is the creation of a harmonised system of official health checks that is based on the equivalence of the health requirements in all Member States, the checks being relocated to the Member State of dispatch. It considers the abovementioned directives to be amongst the measures intended to bring about the gradual completion of the internal market. In that regard, the Commission points out that the Court has already held in *Dillenkofer and Others* that the fact that a directive includes the completion of the internal market amongst its aims does not exclude the possibility that its provisions function also to protect individual rights.

B — *Second question*

27. The *claimant* in the main proceedings, the *Commission* and the *Greek Government* take the view that in order to found a claim seeking to establish State liability under Community law, following transposition and application of Directives 64/433 and 89/662 in breach of Community law, the producers and distributors of pigmeat — irrespective of whether provisions of those directives accord them individual rights — may rely on an infringement of Article 28 EC. In their view, whilst a harmonisation of laws deprives the Member States of the possibility of relying on the justifications established by Article 30 EC, it does not, however, preclude the application of Article 28 EC. Whilst secondary law may give concrete expression to that Treaty provision, it cannot, however, preclude its application. In a case such as the one at issue here, the protective objective pursued by Article 28 EC coincides with that of the provisions of Directives 64/433 and 89/662 in question. Accordingly, the breach of secondary legislation must be considered also to constitute a breach of primary law.

28. However, the *German Government* takes the view, shared by the *Czech*, *French*, *Polish* and *Italian Governments*, that, in the event of the directives not conferring individual rights on persons, they are precluded also from

4 — [1998] ECR I-6871.

relying on an infringement of Article 28 EC in order to found a State liability claim against a Member State. It follows from the Court's judgment establishing the infringement of the directives at issue that those directives provide for the harmonisation of measures to detect and assess the sexual odour of uncastrated male pigs. Accordingly, the national measure must be assessed not by reference to primary law but in the light of the relevant secondary law provisions.

29. The *German Government* contends that, given the fact that an assessment of the legality of the national measure at issue can be made only by having reference to secondary law, the same principle must apply in examining whether the measure prejudices individual rights. On that point it argues that a necessary congruence must exist between the test for assessing the legality of the national measure and that for determining the existence of a claim seeking to establish State liability under Community law. For those purposes, the legal provision infringed and the provision conferring individual rights must be identical.

30. The *German* and *Polish Governments* argue, in addition, that when assessing an infringement of secondary law and one of primary Community law entirely different criteria apply. Whereas the failure to transpose a directive already constitutes an infringement of that instrument, the same Member State conduct — on the assumption that no harmonisation has been effected through secondary law — would have to be examined for compatibility with Article 28 EC and would potentially be covered by a justification contained in primary law. Moreover, as the Danish pig farmers and slaughterhouses do not themselves export their products, the present case does not exhibit any cross-border features and, therefore, does not come within the scope of Article 28 EC. Any loss suffered is merely incidental.

C — *Third question*

31. *All the governments* submitting observations and the *Commission* take the view that Community law does not require the bringing of infringement proceedings by the Commission to result either in an interruption of the limitation period for claims seeking to establish State liability under Community law or in a suspension in that limitation period's operation for the duration of those proceedings.

32. The abovementioned parties justify that view on grounds of the autonomy of Member States in matters of procedural law. That autonomy permits each Member State to determine limitation periods and to provide itself for rules concerning the interruption or suspension of those periods, subject to the condition that, from the perspective of the person with a claim, the relevant provisions are no less favourable than those applying to claims seeking to establish State liability under national law and enforcement of the

claim under Community law is not rendered in practice impossible or excessively difficult. That follows, moreover, in the view of those parties, from Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 40, concerning time-limits in relation to State liability claims under Community law. The view that Treaty infringement proceedings neither interrupt nor suspend the operation of the limitation period is compatible with the principle of effectiveness. The Commission takes the view that as a matter of Community law interruption or suspension of the limitation period is required only if the injured party himself utilises a legal remedy with a view to satisfying his duty to mitigate loss.

33. Moreover, the *German* and *Polish Governments* argue that case-law on the second paragraph of Article 288 EC governing the Community's own liability has formulated very restrictive conditions in that regard. Thus, the Court of First Instance has held that the limitation period must be interrupted by the person having the claim himself (Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 117 et seq.). Furthermore, they consider Treaty infringement proceedings to be an act of legal review effected in the public interest, the primary aim of which is not the safeguarding of individual legal positions. Accordingly, the question of whether Treaty infringement proceedings ought to be brought lies within the Commission's sole discretion, without any possibility for individuals concerned to require such proceedings to be brought. Moreover, the Greek Government notes that no time-limits apply to the bringing of Treaty infringement proceedings.

34. *All the governments* submitting observations in the present case and the *Commission* share the view that the absence of a legal remedy under national law to compel a Member State to effect the transposition of a directive has no bearing on the rules concerning the bringing of a State liability claim or, in particular, on the time-limits applicable to such a claim.

35. The *claimant* in the main proceedings, prior to expressing a view on the third question, comments on the issue whether Community law precludes the application by analogy of Paragraph 852 of the old version of the BGB, the solution favoured by the referring court. In contrast to other provisions establishing longer limitation periods, Paragraph 852 of the old version of the BGB provides for a period of three years. According to the claimant, German law is unclear as to which national limitation period applies to a claim seeking to establish State liability under Community law. Neither legislation nor case-law of the highest courts exists on that point. In the legal literature, too, different views are expressed on the matter. In the claimant's view, the analogous application of Paragraph 852 of the old version of the BGB — a provision in fact intended to deal with the personal liability of a public official — for the first time in the present case constitutes an infringement of the principles of legal certainty and legal clarity and infringes the principle of effectiveness, too. For a limitation period to serve its purpose of ensuring legal certainty, it must be fixed in advance (Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 39). Moreover, the claimant considers the principle of equivalence to be infringed, because a litigant bringing a State liability claim under national law has knowledge of the limitation period which applies to

his claim whereas an individual seeking to bring a claim against the German State on the basis of Community law may only speculate on which limitation period will be applied by analogy.

36. The claimant argues further that Community law additionally precludes application of Paragraph 852 of the old version of the BGB by analogy by reason of the fact that — contrary to the view taken by the referring court — in its capacity as claimant in the main proceedings it had prior to 1997 no means of identifying the party from whom reparation had to be sought. Prior to the delivery of the judgment in Case C-302/97 *Konle* [1999] ECR I-3099, it was unable to ascertain whether it should bring proceedings against the Member State itself or against the *Länder* whose authorities in the course of implementing the legislation also committed infringements of Community law.

37. The *Commission* presumes that the referring court implicitly asks — in advance even of the third and fourth questions — whether Community law precludes the application by analogy of Paragraph 852 of the old version of the BGB, the provision governing the limitation period applicable to claims seeking to establish the liability of public officials under national law. In the Commission's view, it is for the national courts to assess, in particular with regard to the principle of effectiveness, whether individuals injured by an infringement of Community law are in a position to ascertain with adequate precision, and to enforce, the rights conferred under the Community law principle of State liability. It considers that only a comprehensive examination of national law and the particular factual circumstances giving rise to the main proceedings can enable the referring court to determine whether application of Paragraph 852 of the old version of the BGB by analogy precludes the claimant from acquiring adequate knowledge of its rights and enforcing them before the national courts.

38. As regards the third question proper, the *claimant* in the main proceedings contends that Treaty infringement proceedings under Article 226 EC constitute a legal remedy for the purposes of German law, the concept of legal remedy having to be interpreted very broadly. Comparable legal remedies under national law, to which recourse was unavailable, however, by reason of the particular features of the prejudicial conduct as a whole, also interrupt the operation of the limitation period according to the claimant. Therefore, the principle of equivalence requires the Treaty infringement proceedings and/or the complaint lodged by the claimant with the Commission to be afforded the same effect as that accorded to a German legal remedy in a comparable situation.

D — *Fourth question*

39. All the observations submitted, with the exception of those of the claimant in the main proceedings, are essentially in agreement that Community law does not require the limitation period provided for by national law to commence only with the full transposition of

the directive in question. Thus, the limitation period may already start running when the first damaging consequences arise and further damaging consequences are foreseeable even if that date is prior to the directive's full transposition.

40. In that connection, it is stressed in the abovementioned observations that as a rule it is a matter for national law to determine when the limitation period for claims seeking to establish State liability on the basis of Community law starts to run, provided that such rules respect the principles of equivalence and effectiveness. With regard to the principle of effectiveness, those observations note in particular that, as the Court has held in connection with actions seeking reimbursement of charges not due, the principle of effectiveness is not infringed if a Member State provides for a time-limit which has already expired prior to the establishment of a situation compatible with Community law (Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 45). Nor, so they argue, does a different conclusion follow from Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 23, in which the Court held that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings. As was later stated in *Aprile*, that solution was adopted solely on grounds of the particular circumstances of the case.

41. At the hearing, the *United Kingdom* essentially expressed the view that the limitation period applicable to claims seeking to establish State liability under Community law is to be determined by reference to national law and that in that regard a limitation period of three years — as provided for by German law — does not run counter to the principles of equivalence and effectiveness. Nor, it argues, is the requirement of effectiveness not met because a national limitation period applies by analogy to liability claims under Community law. Moreover, Community law does not require that the limitation period provided for by national law commence only with the full transposition of the directive concerned.

42. The *claimant* in the main proceedings proceeds first of all on the basis that — contrary to the view taken by the referring court — the harmful conduct of the German authorities is capable only of categorisation as a continuing act, with the result that the limitation period may not begin to run until the conduct ceases or further damaging acts are abstained from. That follows, in particular, from Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 77 et seq. In that case, the Court held that a national rule under which the limitation period for an action for damages begins to run from the day on which an agreement or concerted practice was adopted could make it impossible in practice to exercise the right to seek compensation. In such a situation, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for an individual who has suffered harm to bring an action.

43. Furthermore, the claimant takes the view that the principles established in *Emmott* must, by way of exception, also be applied to the present case because here, too, special circumstances prevail. These are apparent from the legal uncertainty which results from the complex interplay of the applicable provisions. A further special feature arises from the fact that the German authorities did not implement the dispute resolution procedure as provided for by Article 8 of Directive 89/662, also resulting in legal uncertainty. Therefore, it was practically impossible for the economic agents concerned to rely directly, vis-à-vis the German authorities, on their rights conferred by the directives.

44. Finally, in the event that the damaging conduct is not considered a continuing act, the claimant in the main proceedings argues, in the alternative, that Paragraph 852 of the old version of the BGB must at least be interpreted in conformity with Community law to mean that reparation is excluded only in relation to the period more than three years prior to the date of initiating State liability proceedings.

E — *Fifth question*

45. In the light of its observations on the third and fourth questions, the *Italian Government* considers it unnecessary to comment on the fifth question.

46. All the other governments participating in the proceedings essentially take the view that Community law does not preclude a provision such as Paragraph 839(3) of the BGB according to which no duty to make reparation arises if the injured party wilfully or negligently fails to avert the loss and damage by utilising a legal remedy. They rely on *Brasserie du pêcheur and Factortame* (cited in footnote 9), stating that it follows from that judgment that the national court may always inquire whether the injured person showed reasonable diligence in order to limit the extent of loss and damage and whether, in particular, he availed himself of all the legal remedies available to him.

47. Further, they argue that the application of Paragraph 839(3) of the BGB does not infringe the principle of effectiveness, unless that is, as the *Czech Government* notes, this provision is interpreted to mean that the injured party must utilise all possible remedies available irrespective of whether or not in the circumstances of the case such utilisation is reasonable. It is for the national courts to establish whether it is reasonable to expect the injured party to rely on the rights derived from the directive which has been incorrectly transposed.

48. The *German Government* stresses that the primacy accorded to primary legal protection does not contradict the principle ensuring the effectiveness of Community law, as the State liability claim under Community law is not precluded on a general basis, but only in cases in which the person putting forward a claim has — in breach of his duty to mitigate his loss — failed to make use of primary legal protection. It takes the view that the use of primary legal protection does not constitute an unreasonable requirement either in the case where a reference by a national court under Article 234 EC is likely or on the initiation of Treaty infringement proceedings under Article 226 EC.

49. The *Czech, Polish* and *French Governments* take the view that in assessing the reasonableness of the requirement to pursue primary legal protection it is irrelevant whether the relevant court probably cannot resolve the questions of Community law at issue without reference to the Court of Justice under the Article 234 EC procedure or that Treaty infringement proceedings under Article 226 EC are already pending.

50. The *Commission* considers that Community law precludes the application of a national provision such as Paragraph 839(3) of the BGB because a claim seeking to establish State liability under Community law is made dependent on an additional negative requirement. However, in order to determine the loss or damage for which reparation may be granted, the national court may, under Community law, always verify whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent.

51. The *claimant* in the main proceedings begins by pointing out that Paragraph 839(3) of the BGB governs the liability of officials and not that of the State, to the extent that it must accept responsibility for the acts of officials. Given the fact that an individual may not rely in this context on parallel proceedings brought by other injured parties, application of this provision would in fact result in each of the over 15 000 Danish undertakings concerned having to bring proceedings in parallel in all the *Länder* against each legal entity responsible for the wrongful conduct of the authorities, which, with well over 50 different authorities operating, would mean more than 750 000 legal claims. To impose such a precondition on the bringing of a claim seeking to establish State liability under Community law would weaken the effectiveness of Community law. In summary, the claimant observes that it, too, acknowledges the existence of a duty to mitigate loss. That duty must not go so far, however, as to require the injured party to pursue every conceivable legal action in order not to forfeit his right under Community law.

VI — Legal appraisal

A — *Introductory remarks*

52. The concept of State liability under Community law owes its existence and detailed formulation to the case-law of the Court. In its leading judgment in *Francovich and Others*, [5] the Court held that, in accordance with a principle of Community law affording rights to individuals, Member States are obliged to make good such loss and damage caused to individuals as result from breaches of Community law committed by the State. From that the Court concluded that a Member State must be liable also for such loss and damage as are sustained by individuals if a directive is not transposed into national law within the prescribed period. [6]

53. The significance of that judgment only becomes evident if one considers the development of Community law on State liability that has been achieved by means of case-law on the basis of the principles of the practical effectiveness of Community law, the obligation on Member States to cooperate in good faith embodied in Article 10 EC and, in particular, the Community's non-contractual liability. [7] Admittedly, unlike the concept of the non-contractual liability of the Community which has its legal basis in the second paragraph of Article 288 EC, [8] no express provisions have hitherto been inserted into Community law governing the liability of Member States. None the less, it is nowadays uncontested that the principle of State liability under Community law is inherent in the system of the Treaty and gives rise to a right to reparation founded directly in Community law. [9]

5 — Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357, paragraph 37. However, in earlier judgments the Court had already held that Member States are generally obliged to bear, within the framework of national rules on State liability, the consequences of loss and damage caused to individuals as a result of a breach of Community law (see Case 60/75 *Russo* [1976] ECR 45, paragraphs 7 to 9). Wathelet, M. and Van Raepenbusch, S., 'La responsabilité des États membres en cas de violation du droit communautaire. Vers un alignement de la responsabilité de l'État sur celle de la Communauté ou l'inverse?', *Cahiers de droit européen* (1997) No 1-2, p. 15, take the view that development of the principle of State liability under Community law was foreseeable long before *Francovich and Others*. They refer first to Case 6/64 *Costa* [1964] ECR 585 in which the supremacy of Community law over national law was established and, in connection with an obligation on Member States to make reparations for breach of Community law, to Case 6/60 *Humblet* [1960] ECR 559 in which an obligation on Member States was first established within the framework of the ECSC Treaty to eliminate the effects of unlawful measures.

6 — *Francovich and Others*, cited in footnote 5, paragraph 46.

7 — The principle of State liability under Community law derives its legitimation from various sources. First and foremost, the Court relies on the principle of the practical effectiveness ('effet utile') of Community law and at the same time on the necessity of effective protection for the rights which Community law accords to economic operators or wishes to see developed in their favour. In addition, it draws on the Member State obligation derived from Article 10 EC to make good the consequences of actions contrary to Community law and more recently makes reference to a general principle inherent in the legal orders of the Member States, under which the unlawful conduct of public institutions is capable of resulting in an obligation to make good the loss and damage caused (see on this point Gellermann, M., *EUV/EGV* (ed. Streinz, R.), Munich, 2003, Volume 57, Article 288, point 38; Wegener, B. and Ruffert, M., *Kommentar zu EUV/EGV* (eds Calliess, C. and Ruffert, M.), 3rd edition, 2007, Article 288, point 36; and Hidien, J., *Die gemeinschaftsrechtliche Staatshaftung der EU-Mitgliedstaaten*, Baden-Baden, 1999, p. 12 et seq.). Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union*, 2nd edition, London, 2006, point 3-041, p. 109, consider the case-law on the non-contractual liability of the Community to be an important foundation for the development of the concept of State liability under Community law.

8 — On the concept of the non-contractual liability of the Community under the second paragraph of Article 288 EC, see my Opinion in Case C-331/05 P *Internationaler Hilfsfonds* v *Commission* [2007] ECR I-5475, point 72 et seq.

9 — See *Francovich and Others*, cited in footnote 5, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20; Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 106; and Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 26.

54. Community law recognises a right to reparation subject to three conditions: the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a direct causal link between the breach of the obligation incumbent on the State and the damage sustained by the injured parties. [10] In *Dillenkofer and Others*, [11] the Court in addition marginally reformulated the first condition, in particular in relation to cases concerning the non-transposition of a directive within the prescribed period — to the effect that the result prescribed by the directive must entail the grant of rights to individuals and the content of those rights must be identifiable on the basis of the provisions of the directive — but at the same time it emphasised that in substance both wordings were intended to have the same meaning. [12]

55. As regards the division of jurisdiction between the Community judicature and the courts of the Member States, it must be observed that it is in principle for the national courts to determine whether the conditions for State liability for a breach of Community law are satisfied in a particular case. [13] However, the existence and extent of State liability for damage ensuing as a result of such a breach are questions concerning the interpretation of Community law which fall within the jurisdiction of the Court. [14]

B — *First question*

1. The applicable interpretative methods

56. By its first question, the Bundesgerichtshof wishes to establish whether Article 5(1)(o) and Article 6(1)(b)(iii) of Directive 64/433 as reenacted by Council Directive 91/497, in conjunction with Article 5(1), Article 7 and Article 8 of Directive 89/662, grant producers and distributors of pigmeat 'subjective' rights [or individual rights — see footnote 34] for the purposes of the first condition governing a claim for State liability under Community law.

57. That minimum requirement, by which the State liability claim's function of protecting individuals is expressed, is satisfied

10 — Goffin, L.,'À propos des principes régissant la responsabilité non contractuelle des États membres en cas de violation du droit communautaire', *Cahiers de droit européen* (1997) No 5-6, p. 537 et seq.; Lenaerts, K., Arts, D. and Maselis, I., cited above in footnote 7, point 3-042, p. 109; Knez, R., 'Varstvo pravic posameznika, ki jih vsebuje pravo skupnosti', 14 *Revizor* (2003) No 4/5, p. 105; Ossenbühl, F., *Staatshaftungsrecht*, 5th edition, Munich, 1998, p. 505; and Guichot, E., *La responsabilidad extracontractual de los poderes públicos según el Derecho Comunitario*, Valencia, 2007, pp. 473 and 474, assume three conditions: (1) the rule of law infringed must be intended to confer rights on individuals, (2) the breach must be sufficiently serious and (3) there must be a direct causal link between the breach and the damage sustained. See, inter alia, *Brasserie du pêcheur and Factortame*, paragraph 51, *Hedley Lomas*, paragraph 25, and *Haim*, paragraph 36 (all cited in footnote 9); Case C-63/01 *Evans* [2003] ECR I-14447, paragraph 83; and Case C-278/05 *Robins and Others* [2007] ECR I-1053, paragraph 69.

11 — Cited in footnote 9, paragraph 23.

12 — To that effect, see also the Opinion of Advocate General Jacobs in Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, point 51.

13 — See *Brasserie du pêcheur and Factortame*, cited in footnote 9, paragraph 22; *British Telecommunications*, cited in footnote 9, paragraph 41; and *Stockholm Lindöpark*, cited in footnote 12, paragraph 38.

14 — *Brasserie du pêcheur and Factortame*, cited in footnote 9, paragraph 25.

if the rule of Community law at issue is intended to confer a right on a sufficiently identifiable group of persons and the content of that right can be determined on the basis of the provision which has been infringed. [15]

58. The third paragraph of Article 249 EC establishes that directives are addressed primarily to the Member States, in particular as they require transposition. None the less, directives may exhibit characteristics incorporating third-party protection, to the extent that they expressly oblige the Member States to establish individual rights. [16] The question of whether a provision of Community law is intended, in this sense, to confer 'subjective' rights must be determined through interpretation in accordance with the interpretative methods recognised in the Court's case-law. [17] The crucial factors in that regard are the wording, spirit and purpose of the provisions at issue and the concerns of the Community legislature evidenced in the preamble to the relevant Community legal instrument. [18]

2. The Court's case-law on individual rights

59. First of all, I should like to indicate that I do not share the view expressed by the claimant in the main proceedings, the Czech Government and the Commission that the

15 — *Francovich and Others*, cited in footnote 5, paragraph 46, and *Dillenkofer and Others*, cited in footnote 9, paragraph 46. Berg, W., *EU-Kommentar* (ed. Schwarze, J.), Baden-Baden, 2000, Article 288, points 79 and 80, p. 2304, considers it sufficient if the purpose of the rule of law at issue, for example, a provision of a directive, is to confer a right on a defined group of persons. If it is clear that the purpose of the rule is to grant a right, it must be examined whether the content of the right at issue can be determined on the basis of the rule concerned. What is required in that regard is that a certain minimum content, in the sense of a minimum right, can be determined in interpreting the rule.

16 — Note Hidien, J., cited above in footnote 7, p. 48, who points out that by definition directives are directed exclusively to the Member States in the sense of establishing an objective or an 'obligation de résultat'. In *Francovich and Others* (cited in footnote 5), the right to insolvency compensation at issue in that case should have been established only following transposition and the adoption of corresponding national employment protection legislation. None the less, the Court identified a liability claim for individuals.

17 — On the interpretative methods recognised in the Court's case-law, see in general Case C-1/96 *Compassion in World Farming* [1998] ECR I-1251, paragraph 49, and Case C-102/96 *Commission* v *Germany*, cited in footnote 4, paragraph 24. According to that case-law, in interpreting provisions of Community law it is necessary to consider not only their wording but also the context in which they occur and the objectives of the rules of which they are part.

18 — Ruffert, M., in Calliess, C. and Ruffert, M. (eds), cited above in footnote 7, Article 288, point 54, p. 2358, considers the Court's case-law on this condition to be of little assistance. He observes that whilst the Court examines the wording and spirit and purpose of the provisions of directives to determine the thrust of the protection and takes account, in particular, of the recitals in the preamble (see *Dillenkofer and Others*, cited in footnote 9, paragraph 30 et seq., and *Norbrook Laboratories*, cited in footnote 9, paragraph 108), the Court of First Instance, however, refers to a general principle of law (prohibition on discrimination) (see Case T-57/00 *Banan-Kompaniet and Skandinaviska Bananimporten* v *Council and Commission* [2003] ECR II-607, paragraph 64). He argues that the criteria employed to assess an individual's entitlement on the transposition of a directive and in relation to the direct effect of directives are applicable to the present issue. On that view, a 'subjective' right exists if, in accordance with its objective purpose, a provision of Community law safeguards the interests of individuals, subject to the condition that such persons actually exist and are capable of individual identification.

contested provisions may confer individual rights on producers and distributors of pigmeat. This conclusion follows, in my opinion, from an overall assessment of the Court's case-law hitherto on State liability and the contested provisions of Community law. However, before I address the latter, I wish to recall certain situations in which the Court has confirmed the existence of an individual right and thereby illustrate the contrast with the present case.

60. First of all, I must mention *Francovich and Others* [19] in which the Court held the provisions of Directive 80/987/EEC [20] to be sufficiently precise as regards the determination both of the persons intended to benefit and of the right afforded to employees guaranteeing the payment of their outstanding claims in the event of the insolvency of their employer, and derived from that the existence of an individual right.

61. Furthermore, in *Dillenkofer and Others* [21] the Court held Directive 90/314/EEC [22] on package travel, package holidays and package tours to establish individual rights since it has the aim of 'the grant to package travellers of rights guaranteeing the refund of money that they have paid over and their repatriation in the event of the organiser's insolvency'.

62. In *Norbrook Laboratories*, [23] the Court held that, in providing that an application for marketing authorisation in respect of a veterinary medicinal product may be refused only for the reasons set out therein, Directive 81/851/EEC [24] gives individuals the right to obtain authorisation if certain conditions are fulfilled. Those conditions are laid down precisely and exhaustively in Directive 81/851 and Council Directive 81/852/EEC of 28 September 1981 on the approximation of the laws of the Member States relating to analytical, pharmaco-toxicological and clinical standards and protocols in respect of the testing of veterinary medicinal products (OJ 1981 L 317, p. 16). The Court concluded that the scope of the right conferred on applicants for marketing authorisation may therefore be adequately identified on the basis of those directives.

63. Finally, in *Stockholm Lindöpark* [25] the Court held that the provisions of Article 17(1) and (2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), read together with those of Articles 2, 6(1) and 13B(b), confer a right to deduct which is sufficiently clear, precise and unconditional for an individual to rely thereon in proceedings against a Member State before a national court.

19 — Cited in footnote 5, paragraph 26.

20 — Council directive of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

21 — Cited in footnote 9, paragraph 42.

22 — Council directive of 13 June 1990 (OJ 1990 L 158, p. 59).

23 — Cited in footnote 9, paragraph 108.

24 — Council directive of 28 September 1981 on the approximation of the laws of the Member States relating to veterinary medicinal products (OJ 1981 L 317, p. 1).

25 — Cited in footnote 12, paragraph 33.

64. The directives interpreted by the Court in the abovementioned judgments are characterised by the fact that they confer either private law rights on employees or consumers in the form of a right to compensation or public law rights on individuals vis-à-vis the authorities to a specific benefit defined in the directives. There, as the Court correctly held, both the persons to whom the right is granted and the content of the right may be identified with sufficient clarity from the wording and the spirit and purpose of the provisions concerned. However, as follows from an interpretation of the relevant Community provisions, comparable features are absent in the present case.

3. Interpretation of the directives at issue in this case

65. First, it must be noted that the objective of Directive 64/433 as reenacted by Directive 91/497 is the establishment of the internal market for fresh meat whilst at the same time ensuring the protection of health. It is clear from the second, third and fourth recitals in the preamble to Directive 64/433 that the Community legislature employs the method of approximation of laws in order to facilitate intra-Community trade, by eliminating trade barriers which result from 'differences between the health requirements of Member States concerning meat'.

66. Therefore, Directive 64/433 established a harmonised system of health inspections which is based on the principle that the public health guarantees required by all Member States are equivalent, and which ensures the protection of health and at the same time equal treatment for products. That system sought to transfer public health supervision to the exporting Member State. [26] Assistance in the achievement of this objective was ultimately provided by Directive 89/662 which lays down rules applicable to veterinary checks in intra-Community trade. Those checks, previously carried out at the borders between Member States, were essentially relocated, as stated in the fifth recital in the preamble to Directive 89/662, to the country of origin of fresh meat.

67. Notwithstanding that relocation, Directive 89/662 affords the Member State of destination the possibility, as set out in Article 5, of checking by means of non-discriminatory spot-checks that products comply with the applicable health provisions. Evidently, the provision is one which is aimed at maintaining public health within the framework of the system established by the directive. The directive authorises, in accordance with Article 7, a prohibition on the distribution of meat in the event that a consignment is found to be defective. It is provided, however, that in such a case the State exercising that right must without delay

26 — See, to that effect, Joined Cases 2/82 to 4/82 *Delhaize Frères 'Le Lion'* [1983] ECR 2973, paragraph 11; Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621, paragraph 25; and Case C-102/96 *Commission* v *Germany*, cited in footnote 4, paragraph 26.

implement the special procedure established by Article 8 in order for the complaints relating to the compatibility of the products with health provisions to be remedied.

68. Whilst the abovementioned directives are clearly centred on the objective of establishing the internal market, [27] they remain almost entirely silent on the role intended for meat producers and exporters in the framework of veterinary checks. Contrary to the argument advanced by the defendant at the hearing, attention must be paid not only to the rights of meat producers but also, in particular, to those of meat exporters, not least because the claimant carries out a share of its meat export activities to Germany through its German subsidiary ESS FOOD. [28] Accordingly, the claimant constitutes an economic unit which — contrary to the argument advanced by the defendant — engages most definitely in cross-border economic activities (production in Denmark and distribution in Germany).

69. In Case C-131/88 *Commission* v *Germany*, [29] the Court held that a directive creates rights and obligations for individuals if by laying down specific and detailed provisions it requires the Member States to adopt a series of prohibitions, authorisation schemes and monitoring procedures. That condition is, however, only partially satisfied in the present case. Although Directive 89/662 lays down a series of procedures concerning checks and the supply of information between competent national authorities, precious few unambiguous rights on which a meat producer or distributor might rely before the competent authorities may be identified on the basis of the mere implicit obligation to tolerate veterinary checks in the country of origin and the non-discriminatory spot-checks in the country of destination permitted in accordance with Article 5(1)(a) of Directive 89/662. Such rights consist exclusively in procedural rights of participation, for example, the right of the consignor or his representative, in accordance with Article 7(1)(b) of Directive 89/662, to elect between the destruction of goods and their use for other purposes, including their return. In addition, Article 8(2) of Directive 89/662 establishes obligations on the competent authorities via-à-vis the consignor or his representative in connection with the grounds on which official decisions are based and the notification of available legal remedies.

70. It is evident, therefore, that the abovementioned provisions of Directive 89/662 are limited essentially to the regulation of procedural aspects of official checks, with producers and distributors of pigmeat accorded a passive role inasmuch as they must tolerate the measures adopted by the competent

27 — See Case C-102/96 *Commission* v *Germany*, cited in footnote 4, paragraph 27, concerning Treaty infringement proceedings brought against the Federal Republic of Germany, in which the Court held that Directive 64/433, as reenacted by Directive 91/497, and Directive 89/662 are amongst the measures by which the gradual completion of the internal market was achieved.

28 — See paragraph 23 of the claimant's written observations.

29 — [1991] ECR I-825, paragraph 7.

authorities. Therefore, those provisions do not confer any rights with a sufficiently defined content capable of establishing the basis for that group of individuals to bring a State liability claim.

71. Nor, likewise, may individual rights be derived from Article 5(1)(o) and Article 6(1)(b)(iii) of Directive 64/433 as reenacted by Directive 91/497, because those provisions merely establish an obligation on national authorities to declare meat which gives off a pronounced sexual odour unfit for human consumption. At the same time, the provisions of the directive establish the obligation to affix a special mark to meat from uncastrated male pigs with a carcase weight in excess of 80 kilograms and to subject that meat to heat treatment. The primary objective of the directives, therefore, is the harmonisation of veterinary checks and of the principles relating to health safety. It is intended to achieve such harmonisation through Member State action which duly satisfies the obligations established in the abovementioned directives. The purpose of those directives is not to protect the rights of producers and only Member States are obliged to take action.

72. The claimant in the main proceedings is correct in its assertion that those provisions must be interpreted as prohibiting the Member States from applying requirements in relation to marketing more onerous than those provided for in Article 6. That interpretation is proposed by Advocate General La Pergola in his Opinion in Case C-102/96 *Commission* v *Germany* [30] and was approved

30 — In his Opinion in Case C-102/96 *Commission* v *Germany*, cited in footnote 4, point 8, Advocate General La Pergola indicated his lack of doubt that the requirements imposed by the German authorities relating to the special marking and heat treatment of pigmeat were contrary to Article 6(1)(b)(iii). In his view, that provision is clear and unequivocal: only carcases weighing in excess of 80 kilograms must bear the special mark and undergo heat treatment except where the establishment is able to guarantee by means of a common method or, in the absence of such a method, by means of a method recognised by the competent authority of the country of origin, that 'carcases giving off a pronounced boar taint may be detected'. He noted that the German authorities, on the other hand, required special marking and heat treatment for carcases below the threshold of 80 kilograms. Moreover, they imposed those requirements despite the fact that the authorities of the country of origin were using a method suitable for detecting meat which gives off a pronounced sexual odour; indeed, in the note in issue it was expressly stated that 'only the modified immuno-enzyme test of Professor Claus [was] recognised as a specific method for measuring the level of [androstenone]'. In the view of the Advocate General, therefore, there was a clear breach of Article 6(1)(b)(iii).

by the Court in its judgment in that case. [31] However, this cannot in any way mean, as the Polish Government correctly points out in its written observations, [32] that an individual right may be derived automatically from the imposition of an obligation on Member States. To adopt an alternative interpretation would result in the situation in which every economic interest of market participants satisfied on the elimination of barriers to intra-Community trade becomes regarded as an individual right. The mere fact that an individual derives an advantage from a legal rule does not, however, establish in itself a 'subjective' right, but provides at most a favourable legal effect by rebound. [33] The doctrine relating to 'subjective' public law rights supports the existence of a 'subjective' right if a provision of mandatory law is intended to serve not only the public interest but in addition at least the interest of particular individuals. Therefore, for the purposes of bringing a claim seeking to establish State liability, it must be asked on the basis of the Court's case-law to date whether the provision breached grants the injured party a 'subjective' right in the sense of a legally protected position. [34] In the light of my foregoing remarks on the directives at issue here, I consider the answer should clearly be no.

4. Conclusion

73. It follows that the first question must be answered as follows: Article 5(1)(o) and Article 6(1)(b)(iii) of Directive 64/433 as reenacted by Directive 91/497, in conjunction with Article 5(1), Article 7 and Article 8 of Directive 89/662, do not place producers and distributors of pigmeat in a legal position which could give rise to a claim seeking to establish State liability under Community law in the event of errors of transposition or application.

31 — Cited in footnote 4, paragraphs 32 and 33. On this point, see Aubry-Caillaud, F., *La libre circulation des marchandises — nouvelle approche et normalisation européenne*, Paris, 1998, p. 68, who points out that in a case of full harmonisation Member State authorities are no longer entitled to impose on products from other Member States marketing requirements other than those established by Community law.

32 — Written observations of the Polish Government, paragraph 14.

33 — To that effect, see Maurer, H., *Allgemeines Verwaltungsrecht*, 11th edition, Munich, 1997, § 8, point 8, p. 152. See in connection with claims for State liability Nettesheim, M., *Die mitgliedstaatliche Durchführung von EG-Richtlinien*, Berlin, 1999, p. 43, who argues that, in order for a directive to confer a 'subjective' right, 'an individual interest worthy of protection should receive clear support'. In his view, 'implementing legislation which touches upon an individual's sphere of interests' is inadequate for that purpose. Similarly, he considers the fact that actions resulting from the directive's provisions 'produce effects supportive of an individual's interests' also to be inadequate for that purpose. The author thereby distinguishes between mere 'interests' and 'rights' (in the sense of interests deserving legal protection). According to Beljin, S., *Staatshaftung im Europarecht*, Cologne, 2000, p. 139, the term 'subjective rights', previously accorded a narrower meaning, is nowadays understood as a generic term covering rights in the narrower sense and legally protected interests and legal positions. He argues that 'mere economic, political, aesthetic or other interests' must be distinguished from legal interests. In his view, an interest does not have legal protection in the event of a mere legal effect by rebound, that is to say, by reason of the purely factual effects of a legal provision and not its normatively intended result, in other words, a rule's mere 'reflection'.

34 — Although the Court generally uses the term '*individuelles Recht*' ('individual right'), it appears that it does not mean anything other than '*subjektives Recht*'. Alexy, R., *Theorie der Grundrechte,* Baden-Baden, 1985, p. 164, understands 'subjective' rights in legal theory terms as legal positions and relations. In that regard, he makes reference to the theoretical approaches of Bernhard Windscheid and Rudolf von Jhering. According to Windscheid, a 'subjective' right is 'the authority or power, granted by the legal order, over the exercise of will', whilst according to Jhering such rights are 'legally protected interests'. Discussion of those theories has resulted in numerous combination theories. Some define a 'subjective' right as a legal power conferred by the legal order on the individual, intended to serve as an instrument with which to satisfy human interests. According to the definition adopted by Georg Jellinek, it is 'a power recognised and protected by the legal order to exercise the human will over property or interests'. Maurer, H., cited above in footnote 33, § 8, point 2, p. 149, takes the view that — from an individual's perspective — a 'subjective' public law right is 'the legal power conferred on an individual as a matter of public law by which that person in pursuance of his own interests may require the State to perform a particular act'.

C — *Second question*

74. In the event that the directives concerned do not confer rights on that group of individuals, the Bundesgerichtshof seeks to ascertain by its second question whether such persons may rely on an infringement of the rules on free movement of goods established by Article 28 EC as the basis for a claim seeking to establish State liability under Community law.

1. The fundamental freedoms as individual public law rights

75. It is recognised in the Court's case-law that individual rights may be derived also from the provisions of primary law establishing the fundamental freedoms. The provisions on the fundamental freedoms not only generate generally applicable law but also grant individuals, in their dealings with persons on whom those provisions impose a duty, a legal authority to rely on the normative rules contained therein. Since those provisions establish such a legal position vis-à-vis the public authorities, one may describe the fundamental freedoms as individual public law rights. [35] Consequently, in the case of their infringement they may constitute the basis for a claim seeking to establish State liability. It is uncontested that this is true of the provisions on the free movement of goods at issue in the present case. [36]

76. Accordingly, in *Brasserie du pêcheur and Factortame* [37] the Court held the first condition for a State liability claim to be satisfied also in the case of an infringement of Article 28 EC as, although that article 'imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national courts must protect'.

77. In *Hedley Lomas*, [38] the Court confirmed that statement and at the same time extended its application to intra-Community trade in animals for slaughter. That case arose from a legal dispute between Hedley Lomas Ltd and the Ministry of Agriculture, Fisheries and Food for England and Wales concerning the

35 — To that effect, see Kingreen, T., in Calliess, C. and Ruffert, M. (eds), cited above in footnote 7, Articles 28 to 30, point 9, p. 578; and by the same author, *Die Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts*, Berlin, 1999, p. 23 et seq.

36 — Accordingly, Müller-Graff, P.-C., *Kommentar über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft* (eds von der Groeben, H. and Schwarze, J.), Baden-Baden, 2003, Volume 1, Article 28, point 316, p. 1065, indicates that — provided the remaining conditions for establishing a claim seeking to establish State liability under Community law are satisfied — a Member State is obliged to make reparation to an individual for the loss and damage sustained following either the adoption of measures contrary to Article 28 EC or a failure to adopt measures protecting the free movement of goods from interference by private entities.

37 — Cited in footnote 9, paragraph 54.

38 — *Hedley Lomas*, cited in footnote 9, paragraphs 27 to 29, makes reference to Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraphs 66 and 67, in which the Court held that 'the provisions of Articles 30 and 34 of the EEC Treaty and Regulation No 2795/75 are directly applicable and confer on individuals rights which the courts of Member States must protect'.

ministry's refusal to issue a licence, requested by Hedley Lomas Ltd, for the export to Spain of live sheep intended for slaughter. The reason for that decision was the treatment of animals in Spanish slaughterhouses contrary to Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter (OJ 1974 L 316, p. 10). The Court held the refusal to issue an export licence to constitute a quantitative restriction on exports contrary to Article 28 EC, not justified on any of the grounds under Article 30 EC, and stated that Article 28 EC creates rights for individuals. Taking into account the fact that at the time when the United Kingdom committed that infringement it was not called upon to make any legislative choices and hardly had any discretion, the Court held the mere infringement of primary law sufficient for the finding that a sufficiently serious breach existed.

78. However, the question remains to be answered whether injured parties may invoke primary law if a harmonisation directive has been adopted in the sphere concerned and whether such a directive must be treated as the exhaustive framework for ascertaining the obligations of a Member State and, where applicable, for determining its liability. In this connection, reference must be made to Case C-102/96 *Commission* v *Germany* [39] in which the Court held that the provisions on the detection of a pronounced sexual odour in uncastrated male pigs have been harmonised.

2. Primacy of secondary law

79. The ability directly to invoke the fundamental freedoms enshrined in primary law might be precluded by the Court's approach evidenced in established case-law, according to which following exhaustive Community-level harmonisation of a particular sphere by way of a directive all national measures relating thereto must be assessed in the light of the provisions of that directive and not those of the EC Treaty. [40] In that connection, the Court also indicated that directives — like all secondary Community law — must be interpreted in the light of the provisions established by the EC Treaty on the free movement of goods.

80. By way of contrast to its earlier case-law, the more recent tendency of the Court is not only expressly to preclude any reliance on the justifications established in primary law set

39 — Cited in footnote 4, paragraphs 29 and 36.

40 — Case 5/77 *Tedeschi* [1977] ECR 1555, paragraph 35; Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 35; Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9; Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 31; Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457, paragraph 25; Case C-324/99 *Daimler-Chrysler* [2001] ECR I-9897, paragraph 32; and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64.

out in Article 30 EC but also to rule out the use of Article 28 EC itself as a criterion. [41] Secondary law gives specific expression to primary law and to that extent is the only criterion against which to assess Member State conduct. [42] For that reason, reliance on a justification is precluded. *Deutscher Apothekerverband*, [43] *Radlberger Getränkegesellschaft and Spitz* [44] and *Denkavit* [45] constitute the most recent confirmation of that case-law. [46]

81. Previous cases examined whether a national rule was compatible with Community law or whether a particular Member State had satisfied its obligations under the relevant directive. However, in my view, the Court's approach, in which the directive functions as the sole reference framework, is inapplicable to the present case.

82. In the present case, the directives breached by the defendant concern merely procedural aspects of the veterinary checks. If the scope of a directive is restricted to the regulation of procedural details, [47] in my view no assumption may be made that the Community legislature in adopting the directives intended also to elaborate the rights of citizens of the Union and thus remove the possibility for them to rely on the right to the free movement of goods established by Article 28 EC.

83. Nor does the interpretation I propose here entail a risk that the conditions for a State liability claim established in the Court's case-law will be circumvented. Infringement of the rules of a directive which by reason of its procedural nature does not grant individual rights does not of itself give rise to a claim seeking to establish State liability under Community law. Rather, a precise examination must be undertaken as to whether infringement of those procedural rules also results in an infringement of the individual right of citizens of the Union to market access established by Article 28 EC. In the present proceedings, that is for the national court to assess. Therefore, contrary to the view expressed by the German Government, infringement of a directive's rules does not automatically result in a breach of Article 28 EC, and consequently there is no risk of Member States facing potentially indeterminable liability.

41 — *Deutscher Apothekerverband*, cited in footnote 40, paragraph 65; Case C-309/02 *Radlberger Getränkegesellschaft and Spitz* [2004] ECR I-11763, paragraph 53; and Case C-145/02 *Denkavit* [2005] ECR I-51, paragraph 22.

42 — To the same effect, see Kingreen, T., in Calliess, C. and Ruffert, M. (eds), cited above in footnote 35, Articles 28 to 30, point 18, who states that secondary law constitutes 'the medium through which the process — fundamental to the Union legal order — occurs in which the guarantees of fundamental freedoms are elaborated and shaped as specific and delimited rights and duties'.

43 — Cited in footnote 40, paragraph 65.

44 — Cited in footnote 41, paragraph 53.

45 — Cited in footnote 41, paragraph 22.

46 — Kingreen, T., cited above in footnote 35, p. 151; the same author indicates, in Calliess, C. and Ruffert, M. (eds), cited above in footnote 7, Articles 28 to 30, point 18, that the Court addresses the relationship between the fundamental freedoms and secondary Community law mostly in relation to the justification of a restriction, holding that, if and to the extent that the case is governed by secondary law, reliance on justification is precluded because the Member States lack competence in that regard. However, he notes that the Court, particularly in its more recent case-law, discusses the matter also in relation to the scope of the provisions concerned.

47 — See point 71 of this Opinion.

3. Conclusion

84. It follows that the second question must be answered as follows. The Danish producers and distributors of pigmeat may rely on an infringement of the rules on the free movement of goods under Article 28 EC in order to substantiate a claim seeking to establish State liability under Community law. However, it is for the national court to determine whether an infringement of provisions of directives which do not grant individual rights results in an infringement of the rights of citizens of the Union to market access established by Article 28 EC.

D — *Preliminary question for the purposes of the third and fourth questions*

85. Both the third and fourth questions concern the effects of Community law on national limitation periods. However, it is clear from the Bundesgerichtshof's order for reference [48] that it seeks an answer to a preliminary question, that is to say, whether the Community law principles of equivalence and effectiveness preclude the application of the three-year limitation period established by Paragraph 852(1) of the old version of the BGB.

48 — Order for reference of 12 October 2006, p. 20, paragraph 24.

1. Competence of the national legislature

86. It must be observed at the outset that, with the exception of Article 46 of the Statute of the Court of Justice governing the Community's non-contractual liability, Community law does not determine the limitation rules applicable to liability claims.

87. Instead, it follows from the Court's established case-law [49] that it is on the basis of national rules that reparation for the consequences of the loss and damage caused must be made. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.

88. For that reason, the Court has recognised expressly that laying down the time-limits applicable to the bringing of claims in tax matters [50] falls within the competence of the

49 — *Francovich and Others*, cited in footnote 5, paragraphs 37 and 42.

50 — *Palmisani*, cited in point 32, paragraphs 27 and 28; Joined Cases C-114/95 and C-115/95 *Texaco and Olieselskabet Danmark* [1997] ECR I-4263, paragraph 46; Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraphs 47 to 49; and Case C-231/96 *Edis* [1998] ECR I-4951, paragraphs 33 and 34.

Member States. To that extent, it seems reasonable also to recognise the competence of the Member States to determine the period on the expiry of which a claim seeking to establish State liability under Community law becomes time-barred, [51] and, in particular, irrespective of whether those periods are classified in national law as substantive or procedural preconditions to the bringing of a claim and/or the establishment of liability. [52]

2. Requirements of equivalence and effectiveness

89. In addition, the Court has held that the setting of reasonable time-limits for bringing proceedings constitutes an application of the fundamental principle of legal certainty with the result that, in principle, time-limits are compatible with Community law provided that the detailed rules concerning their application comply with the principles of equivalence and effectiveness. [53]

90. The principle of equivalence means that the substantive and procedural conditions for reparation of loss and damage established by the national law of the Member States may not be less favourable than those relating to similar domestic claims. The principle of effectiveness must for its part be defined as meaning that those conditions may not be so framed as to make it in practice impossible or excessively difficult to obtain reparation. [54]

51 — To the same effect, see Pestalozza, C.,'Roß und Reiter: Art. 34 GG und die gemeinschaftsrechtliche Staatshaftung' *Gemeinwohl und Verantwortung: Festschrift für Hans Herbert von Arnim zum 65. Geburtstag*, Berlin, 2000, p. 291, who takes the view that, to the extent that neither Community law nor Article 34 of the German Basic Law (Grundgesetz) establishes detailed rules, German law applies in a supplementary manner to the claim under Community law. In that regard, he makes reference to private law rules on contributory fault and limitation periods. Gellermann, M. *EUV/EGV*, cited above in footnote 7, Volume 57, Article 288, point 56, takes the view that the question concerning the period following which a claim for reparation becomes time-barred is determined in accordance with national rules. In his opinion, recourse to Article 46 of the Statute of the Court of Justice is precluded because the claim, although required by Community law, derives its detailed form from rules of national law. To that extent, Member States remain competent to specify the precise length of the period after which claims become time-barred, subject only to compliance with the principles of efficiency and non-discrimination. A similar view is taken also by Hidien, J., cited above in footnote 7, p. 71. According to Kischel, U., 'Gemeinschaftsrechtliche Staatshaftung zwischen Europarecht und nationaler Rechtsordnung', *Europarecht*, 4/2005, p. 450, limitation periods fall within the procedural autonomy of the Member States and, in particular, irrespective of whether national law categorises those limits as rules of procedural or substantive law.

52 — Under German law, a time-bar (*Ausschlussfrist*) and limitation (*Verjährung*) may be distinguished by their effects. With a time-bar the relevant right becomes extinguished on the expiry of the period concerned; expiry of a limitation period, however, gives rise merely to a right to refuse performance. In the course of a legal dispute, operation of a time-bar must be observed by a court of its own motion, while expiry of a limitation period can be raised only on the application of a party. Whereas limitation periods apply only in relation to rights requiring another to perform or to desist from performing (*Ansprüche*) (Paragraph 194 of the BGB), time-bars apply to other rights — above all to those entitling a party to modify a legal relationship (*Gestaltungsrechte*) — but exceptionally also to rights requiring another to perform or desist (see Palandt, O. and Heinrichs, H., *Bürgerliches Gesetzbuch*, 64th edition, Munich, 2005, overview prior to § 194, point 13).

53 — See Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraphs 13 and 16; *Francovich and Others*, cited in footnote 5, paragraph 43; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14 et seq.; *Palmisani*, cited in point 32, paragraph 27; Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 45; Joined Cases C-52/99 and C-53/99 *Camarotto and Vignone* [2001] ECR I-1395, paragraphs 28 and 30; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; and *Manfredi and Others*, cited in point 42, paragraph 62. To that effect, see also Von Bogdandy, A., *Das Recht der Europäischen Union* (eds Grabitz, E. and Hilf, M.), Volume I, Munich, 2007, Article 10, points 48, 54 and 54a.

54 — *Francovich and Others*, cited in footnote 5, paragraphs 41 to 43; *Norbrook Laboratories*, cited in footnote 9, paragraph 111; and Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 58.

91. In principle, specific review as to whether a procedural measure fulfils these requirements lies with the national courts, whose task it is, in application of the principle of cooperation laid down in Article 10 EC, to ensure the legal protection which persons derive from the direct effect of provisions of Community law. Consequently, if a national court finds that from that point of view a national rule is not compatible with Community law, it must disapply the rule. [55]

92. However, review in the abstract of the above requirements is for the Court of Justice, which, in the context of references for a preliminary ruling under Article 234 EC, is entrusted with ensuring that Community law is uniformly applied. [56]

93. As regards compliance with the principle of equivalence, no objections exist, as far as I can see, to the setting of a three-year limitation period as provided for by Paragraph 852(1) of the old version of the BGB, since claims based on Community law are treated — according to information supplied by the referring court — on exactly the same basis as domestic law claims.

94. As regards compliance with the principle of effectiveness, it cannot be discerned how a three-year period would make it difficult or even impossible to assert claims under Community law, [57] in particular as the Court presumes national time-limits, in principle, to be compatible with Community law and in *Palmisani* [58] even held a one year time-limit for the bringing of a claim for the reparation of loss and damage to be lawful in accordance with the prevailing state of Community law. The same applies to time-limits of two, [59] three [60] and five years [61] governing claims for the recovery of sums paid but not due.

3. Conclusion

95. Thus, it may be held that the Community law principles of equivalence and effectiveness do not preclude the application of a three-year limitation period on the expiry of

55 — To the same effect see the earlier view of Advocate General Cosmas in *Palmisani*, cited in point 32, point 20.

56 — See the Opinion of Advocate General Cosmas in *Palmisani*, cited in point 32, point 21, and the judgment in that case, paragraph 33.

57 — This view is also to be found in the legal literature. See, for example, Gellermann, M., cited above in footnote 7, Article 288, point 56; Hidien, J., cited above in footnote 7, p. 72; Schwarzenegger, P., *Staatshaftung — Gemeinschaftsrechtliche Vorgaben und ihre Auswirkungen auf nationales Recht*, Vienna, 2001, p. 137; Ossenbühl, F., *Staatshaftungsrecht*, 5th edition, Munich, 1998, p. 520, who all consider a three-year limitation period to be unobjectionable from the Community law perspective. See also the 'Draft Common Frame of Reference' developed by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), which in Part III 7:201 provides for a general limitation period of three years (see *Principles, Definitions and Model Rules of European Private Law — Draft Common Frame of Reference, Interim Outline Edition* (eds von Bar, C. et al.), Munich, 2008, p. 185).

58 — Cited in point 32.

59 — *Camarotto and Vignone*, cited in footnote 53, paragraph 30.

60 — *Edis*, cited in footnote 50.

61 — Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 49, and *Fantask and Others*, cited in footnote 50, paragraph 49.

which a claim seeking to establish State liability under Community law is time-barred.

E — *Third question*

1. Whether the question referred is necessary to enable the referring court to give judgment

96. By its third question, the Bundesgerichtshof wishes to ascertain whether the operation of the limitation period for claims seeking to establish State liability in relation to loss and damage arising from the inadequate transposition of a directive is interrupted or suspended where the Commission brings Treaty infringement proceedings under Article 226 EC against the State concerned, to the extent that no effective domestic legal remedy exists with which the Member State may be compelled to transpose the directive.

97. It is apparent from the order for reference that Treaty infringement proceedings under Article 226 EC were initiated against the Federal Republic of Germany on 27 March 1996 and ended by way of declaratory judgment of 12 November 1998. The initial damaging consequences were already known to the injured parties in 1993, but they did not commence proceedings asserting their liability claim until December 1999. If, as the Bundesgerichtshof presumes, one works on the basis of the three-year limitation period under German law governing official liability, provided for by Paragraph 852(1) of the old version of the BGB, [62] and one allows for knowledge of the facts on the basis of which the bringing of proceedings for official liability might reasonably have been expected, according to the Bundesgerichtshof the date from which the limitation period begins to run must be set in mid-1996. [63] Thus, the possibility that the claim is time-barred may not be precluded. In that regard, for the purposes of reaching a decision in the main proceedings it is relevant whether initiation of Treaty

62 — According to settled case-law, the need to ensure that Community law is fully applied requires Member States not only to bring their legislation into conformity with Community law but also to create a situation which is sufficiently precise, clear and transparent to allow individuals to know the full extent of their rights and rely on them before the national courts (see, to that effect, in relation to directives Case C-360/87 *Commission* v *Italy* [1991] ECR I-791, paragraph 12, and Case C-220/94 *Commission* v *Luxembourg* [1995] ECR I-1589, paragraph 10. See further Case C-162/99 *Commission* v *Italy* [2001] ECR I-541, paragraphs 22 to 25, and Case C-478/01 *Commission* v *Luxembourg* [2003] ECR I-2351, paragraph 20). As I argued in my Opinion in Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, point 75, that principle must apply a fortiori if national law imposes obligations on individuals and threatens sanctions in the event of non-compliance. In my view, the legal position must be clear also in respect of the relevant limitation period, thus allowing a party injured as a result of Member State conduct contrary to Community law to bring State liability proceedings before such an action becomes time-barred. The Bundesgerichtshof presumes Paragraph 852(1) of the old version of the BGB to be applicable and thus evidently that under German law the provisions on official liability, with a three-year limitation period, and not, for example, the principles relating to unlawful official interference with private property, with a 30-year limitation period, apply by way of analogy to claims seeking to establish State liability under Community law. In that regard, it refers in paragraph 23 of the order for reference to the prevailing view expressed in the legal literature. See also Schulze, G., 'Staatshaftung (Art. 288 EGV, § 839 BGB)', *Zivilrecht unter europäischem Einfluss* (eds Gebauer, M. and Wiedmann, T.), Stuttgart, 2005, Chapter 16, point 29, p. 649, who presumes that the provisions governing the liability of public authorities for delicts are applicable.

63 — See the order for reference of the Bundesgerichtshof of 12 October 2006, paragraphs 33 and 42. The Bundesgerichtshof bases its deliberations on the case-law of the highest German courts concerning the computation of limitation periods applicable to claims seeking reparation for loss and damage and on the prevailing view expressed in the legal literature. It proceeds on the basis that as early as mid-1996 the claimant could reasonably be expected to have initiated proceedings seeking reparation for loss and damage and, therefore, that time began to run from that time. In reaching that assessment, it has regard, first, to the injured party's knowledge of the damaging consequences (paragraph 34), and, second, also to the fact that the loss and damage were caused by multiple repeated acts and did not derive from a single continuing act (paragraph 42).

infringement proceedings by the Commission had any effect on the running of the limitation period.

2. Treaty infringement proceedings as a mechanism for general judicial review

98. First, it must be recalled that, as held in *Brasserie du pêcheur and Factortame*, [64] the existence of a liability claim against a Member State does not depend on a judgment being delivered in proceedings brought under Article 226 EC in relation to the infringement concerned.

99. Furthermore, in my view, the specific function which attaches to Treaty infringement proceedings militates against their resulting in an interruptive or suspensory effect in relation to the running of the limitation period for liability claims. Unlike national court proceedings, the purpose of Treaty infringement proceedings under Article 226 EC is not the protection of individual interests; instead they constitute general judicial review proceedings [65] in which the Commission is entitled to take action in the Community public interest against Member State infringements of general Community law without any necessity that the Commission's own rights or those of citizens of the Union have been infringed. [66]

100. Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. [67] That discretion of the Commission excludes the right for individuals to require it to adopt a specific position. A fortiori, individuals may not require the initiation of the Article 226 EC procedure and even less the commencement of an action before the Court. Excluded, too, is the possibility of an action for annulment under the fourth paragraph of Article 230 EC challenging the Commission's refusal to act. [68]

64 — Cited in footnote 9, paragraph 54.

65 — Cremer, W., in Calliess, C. and Ruffert, M. (eds), cited above in footnote 7, Article 226, point 2, p. 1979, refers to 'general judicial review proceedings'. Lenaerts, K., 'The rule of law and the coherence of the judicial system of the European Union', *Common Market Law Review*, 6/2007, p. 1636, recalls the fact that in Treaty infringement proceedings under Article 226 EC a declaration is sought by which the Court establishes that the conduct of a Member State infringes Community law. The protection of individual interests is not mentioned — in my view, correctly — as a purpose of such proceedings.

66 — Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15; Case C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraph 16; and Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 21. See, in that connection, my Opinion in Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, point 55. For that reason, according to settled case-law (see Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 65; Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 23; Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraphs 14 and 15; and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 29), when exercising its powers under Article 226 EC the Commission does not have to show that there is a specific interest in bringing an action. The Commission's function is to ensure, of its own motion and in the general interest, that the Member States give effect to Community law and to obtain a declaration as regards any failure to fulfil the obligations deriving therefrom with a view to bringing that failure to an end.

67 — Case C-431/92 *Commission* v *Germany*, cited in footnote 66, paragraph 22.

68 — See Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11; Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 6; and Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 71.

101. In my view, the inability of individuals to enforce by legal action the initiation of Treaty infringement proceedings and the resulting uncertainty as to whether and, if so, at what date such a step will be taken preclude the linking of suspension or interruption of the limitation period to the Commission's commencement of Treaty infringement proceedings, since the purpose of suspending the limitation period on the prosecution of claims is precisely to prevent the right-holder — notwithstanding his commencement of proceedings asserting the claim — from losing it as a result of time elapsing. [69] However, that presupposes that the right-holder is actually prosecuting a claim. If, however, the initiation of Treaty infringement proceedings by the Commission does not constitute the 'prosecution of a claim' in the strict sense, since such action, as it has already been seen, does not seek to protect individual interests, it is not evident why it should be attributed a suspensory or interruptive effect in relation to the limitation period.

3. No requirement to accord preferential treatment to State liability claims

102. The issue — as additionally mentioned by the referring court in this context — of absence of an effective domestic legal remedy by which the injured parties may require the Member State directly, that is to say, not through the State liability route, to eliminate the infringement giving rise to State liability is, in my view, irrelevant.

103. In this connection, regard must be had to the fact that, although the principles of equivalence and effectiveness aim to ensure that Community law matters are not subject to less favourable treatment, they do not require preferential treatment over domestic matters. To accord Treaty infringement proceedings legal effects in relation to domestic proceedings would result, however, in preferential treatment as a consequence of the suspension or interruption of the limitation period.

4. Conclusion

104. It follows that the third question must be answered as follows: Neither the Community law principles on liability of the Member States nor Article 226 EC require the limitation period laid down in domestic law for a claim seeking to establish State liability under Community law to be interrupted if Treaty infringement proceedings under Article 226 EC are commenced or to be suspended pending the end of those proceedings.

69 — According to Palandt, O. and Heinrichs, H., cited above in footnote 52, § 204, point 1, and the overview prior to § 194, point 10, it is inherent in the reason and purpose of limitation periods that a rightholder must have the opportunity to prevent the operation of a time-limit by asserting his claim. If he allows that opportunity to expire, the loss of rights arising through the operation of the time-limit is considered justified.

F — *Fourth question*

1. Introductory remarks

105. The fourth question seeks to ascertain whether the limitation period for a State liability claim resulting from the incorrect transposition of a directive commences, irrespective of the applicable national law, only with the full transposition of the directive or whether, in accordance with national law, that period begins to run when the first injurious effects have been produced and further injurious effects are foreseeable. If full transposition has a bearing on the commencement of the limitation period, the referring court wishes to know whether this applies in general or only if the directive confers rights on individuals.

106. In the absence of relevant Community rules on the calculation of limitation periods, national rules are decisive, subject again to compliance with the principles of equivalence and effectiveness. There is nothing in the order for reference to indicate that German law treats claims seeking to establish State liability under Community law differently in procedural terms from corresponding claims for reparation based on national law alone. However, in the case at hand detailed examination of that matter remains within the jurisdiction of the referring court.

107. Therefore, the fourth question primarily requires the requirement of effectiveness to be examined. Thus, it must be determined whether, in not setting the commencement of the limitation period as being the date on which a directive is properly transposed into national law, enforcement of individual rights conferred by Community law is made in practice impossible or excessively difficult.

108. With the exception of the claimant in the main proceedings, none of the parties appears to support that argument. Instead, the predominant view expressed is that no obligation arises under Community law for a Member State to adopt limitation rules which result in the limitation period commencing only at the date of the correct implementation of a directive in national law. In the light of the Court's existing case-law and following a comparison with the limitation rules established under Article 46 of the Statute of the Court of Justice, I also consider that view to be preferable.

2. Case-law of the Court

109. The Court has held in connection with actions for the repayment of charges levied in breach of a directive that Community law does not preclude national time-limits which begin to run even before the correct implementation of the directive concerned. [70]

110. Admittedly, in *Emmott* [71] the Court held that until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a national time-limit may begin to run only from that time.

111. None the less, in later case-law [72] the Court stated that the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which a time-bar had the result of depriving the applicant in the main proceedings of any opportunity whatsoever to rely on her right to equal treatment under a directive.

112. Moreover, there is no evidence in the case-file that the conduct of the German authorities in conjunction with the contested limitation period established by Paragraph 852(1) of the old version of the BGB would have resulted, in the present case, as in *Emmott*, in the claimant being deprived of any opportunity to assert its rights before the national courts.

70 — See, for example, Case C-260/96 *Spac* [1998] ECR I-4997, paragraph 32, in which the Court held that, 'in circumstances such as those of the main proceedings, Community law does not prevent a Member State from resisting actions for repayment of charges levied in breach of a directive by relying on a time-limit under national law which is reckoned from the date of payment of the charges in question, even if, at that date, the directive concerned had not yet been properly transposed into national law'.

71 — Cited in point 40, paragraphs 21 to 24. The justification underlying that judgment was that individuals are unable to ascertain the full extent of their rights so long as a directive has not been properly transposed into national law. Accordingly, only the proper transposition of the directive is capable of bringing that state of uncertainty to an end. From that the Court concluded that a national time-limit may begin to run only at that time.

72 — Joined Cases C-279/96 to C-281/96 *Ansaldo Energia and Others* [1998] ECR I-5025, paragraphs 19 to 21; *Spac*, cited in footnote 70, paragraphs 27 to 32; *Fantask and Others*, cited in footnote 50, paragraphs 50 to 52; *Texaco and Olieselskabet Danmark*, cited in footnote 50, paragraph 48; *Haahr Petroleum*, cited in footnote 61, paragraph 52; Case C-410/92 *Johnson* [1994] ECR I-5483, paragraph 26; and Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475, paragraph 19.

3. Comparison with the limitation rules established under Article 46 of the Statute of the Court of Justice

113. The fact that no infringement of the principle of effectiveness results if the limitation period in respect of claims for State liability begins to run even before the directive concerned has been properly implemented may be inferred also from the principles governing the time-limits for claims concerning the liability of the European Community for damage under the second paragraph of Article 288 EC. [73]

114. It is recognised in the case-law of the Community judicature that the limitation period laid down by Article 46 of the Statute of the Court of Justice cannot begin to run before all the requirements upon which the obligation to make good the damage depends are satisfied and in particular, in cases where liability stems from a legislative measure, before the injurious effects of the measure have been produced. [74] The basis for determining the commencement date is the date at which the claimant becomes aware of the event giving rise to loss and damage. [75]

115. Against that background, no assertion may be made that setting the starting date for a limitation period at a time at which a directive has not been properly implemented makes it in practice impossible or excessively difficult to pursue claims for State liability. Thus, Community law as it currently stands does not require that in determining the starting date a date prior to full transposition may not be used. Rather, it is for national law to establish rules by which the precise starting date for the limitation period may be determined. [76]

73 — I consider it legitimate to take account of the principles governing the Community's non-contractual liability in connection with the setting of limitation periods, particularly as those principles served as a basis for the Court's elaboration of the action for State liability under Community law (see Lenaerts, K., Arts, D. and Maselis, I., cited above in footnote 7). Liability of the Community and State liability under Community law are equally characterised by judge-made law and were developed by the Court alongside one another. The functional parallel which exists between both liability regimes results necessarily — subject to the competences of the Member States in the transposition into national law of State liability under Community law — in similarities in the assessment thereof. Accordingly, this has resulted in the case-law guidelines mutually influencing one another in the specification of liability conditions (to the same effect, see Schulze, G., cited above in footnote 62, Chapter 16, points 2 and 3, p. 638).

74 — See Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 10, and Case 51/81 *De Franceschi* v *Council and Commission* [1982] ECR 117, paragraph 10, according to which the period of limitation which applies to proceedings in matters arising from the non-contractual liability of the Community cannot begin before all the requirements upon which the obligation to make good the damage depends are satisfied and in particular before the damage to be made good has materialised, and see also Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 107, and Joined Cases T-195/94 and T-202/94 *Quiller and Heusmann* [1997] ECR II-2247, paragraph 114. See further the Opinion of Advocate General Sharpston in Case C-51/05 P *Commission* v *Cantina sociale di Dolianova* [2008] ECR I-5341, point 94. According to Rengeling, H.-W., Middeke, A. and Gellermann, M., *Handbuch des Rechtsschutzes in der Europäischen Union*, Munich, 2003, § 9, point 57, p. 202, the limitation period applicable to non-contractual liability does not begin to run until all the requirements upon which the obligation to make good the damage depends are satisfied and in particular not before the damage to be made good has materialised. They indicate that the basis for determining this is the date at which the claimant becomes aware of the event giving rise to loss or damage.

75 — See Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraphs 50 and 51.

76 — To that effect, see also Schwarzenegger, P., cited above in footnote 57, p. 137, who states that it is for national law to set the starting date for limitation periods.

116. In view of the foregoing considerations, it is unnecessary to comment on the second part of the question.

4. Conclusion

117. For that reason, the fourth question must be answered as follows: Community law as it currently stands does not require in any event that the limitation period for a State liability claim under Community law which is based on the inadequate transposition of a directive and an accompanying (de facto) import ban commences only with full transposition of the directive.

G — *Fifth question*

1. Whether the injured party is under an obligation to avert loss and damage

118. The fifth question seeks to ascertain, first, whether the claimant's claims may be precluded by reference to Paragraph 839(3) of the BGB on the basis that the claimant wilfully or negligently failed to avert the loss and damage by utilising a legal remedy and whether any recourse to that provision infringes the principles of equivalence and effectiveness.

119. As the Court stated in *Brasserie du pêcheur and Factortame*,[77] in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured party showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.

120. Furthermore, referring to its judgment in *Mulder and Others* v *Council and Commission*, it held that it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of

77 — Cited in footnote 9, paragraph 84.

the loss or damage, or risk having to bear the loss or damage himself. [78]

121. The Court acknowledges, therefore, that in assessing a claim for reparation regard may be had to the question whether the injured party showed reasonable diligence in order to avert the loss or damage or limit its extent and whether, in particular, the injured party availed himself in time of all the legal remedies available. As the Bundesgerichtshof correctly observes in paragraph 49 of the order for reference, the Court has considered, in addition, not only reductions to claims in the event of partial fault but also the possibility of a total loss of claim.

122. However, that case-law leads in no way inexorably to the conclusion that omissions by the injured party at the level of primary legal protection aimed as a defence against State interference should result, in a manner similar to that in German law, in exclusion of the claim generally. Instead, it must be assumed that consideration of this possibility will be permitted only in exceptional cases, whereas, as a rule, a breach, arising by way of fault, of the obligation to avert loss and damage will result merely in a reduction of the claim. [79]

123. That view is supported by the fact, too, that an obligation to mitigate loss is recognised also in the framework of the non-contractual liability of the Community under the second paragraph of Article 288 EC and that a failure to comply with that obligation results, in accordance with the degree of contributory fault, in a reduction or even a total exclusion of the claim. [80]

124. In principle, no objections arise in relation to the requirement of effectiveness when State liability claims are asserted, provided that in the interpretation and application of national law those Community law principles are respected and, in addition to the total loss of a claim, the possibility of its reduction is permitted. As regards the principle of equivalence, the application of

78 — Ibid., paragraph 85, which refers to Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33.

79 — To that effect, see, for example, Hatje, A., 'Die Haftung der Mitgliedstaaten bei Verstößen des Gesetzgebers gegen europäisches Gemeinschaftsrecht', *Europarecht*, 3/1997, p. 305, who presumes in doctrinal terms that omissions by the claimant at the level of primary legal protection aimed as a defence against State interference do not generally result in the claim's exclusion, but instead, in the first instance, merely influence the extent of the reparation entitlement. A similar view is expressed by Beljin, S., cited above in footnote 33, p. 67, who considers that the Court does not intend such extensive account to be taken of the partial fault of the claimant as is the case in German law. He takes the view that the Court presumes a Community law principle with Community content to exist with the result that the elements of Paragraphs 254 and 839(3) of the BGB take effect not entirely but only to the extent that they correspond with the general tenor of Community law.

80 — See *Adams* v *Commission*, cited in footnote 75, paragraph 53, and Rengeling, H.-W., Middeke, A. and Gellermann, M., cited above in footnote 74, § 9, points 55 and 56, p. 201.

Paragraph 839(3) of the BGB is unproblematic, as corresponding claims for official liability under national law are subject also to the proviso that primary legal protection takes precedence.

125. Consequently, in principle, Community law does not preclude the application of a national law rule which provides — as Paragraph 839(3) of the BGB does — for the exclusion of liability in cases of culpable omission to pursue primary legal remedies. [81]

81 — To the same effect, see Gellermann, M., cited above in footnote 7, Article 288, point 54. Berg, W., cited above in footnote 15, Article 288, point 93, p. 2308, takes the view that, in the case of a directly applicable Community law provision, if the executive denies an individual his rights, that person, therefore, must first attempt to obtain enforcement of that provision by judicial means. In his view, only if such an attempt fails are claims for reparation of loss and damage possible. In principle, according to the author, the primacy accorded to primary legal protection applies in relation also to claims for reparation of loss and damage sustained as a result of legislative acts and omissions. Papier, H.-J., 'Staatshaftung bei der Verletzung von Gemeinschaftsrecht', *Handbuch zum europäischen und deutschen Umweltrecht, Band 1, Allgemeines Umweltrecht*, Cologne, 1998, point 44, p. 1470, states that no grounds exist for the principle expressed in Paragraph 839(3) of the BGB — establishing primacy for primary legal protection available through the administrative courts — not to apply in cases of a breach by public authorities of Community law. He considers that the action for liability under Community law developed by the Court leaves it to the Member State concerned to remedy the consequences of the Community law infringement attributable to that State within the framework of national liability rules. Von Danwitz, T., 'Die Eigenverantwortung der Mitgliedstaaten für die Durchführung von Gemeinschaftsrecht — Zu den europarechtlichen Vorgaben für das nationale Verwaltungs- und Gerichtsverfahrensrecht', *Deutsches Verwaltungsblatt*, 1998, p. 425, footnote 40, takes the view that liability restrictions in the sense of an obligation to mitigate or avert liability should remain permissible. In that regard, he makes reference to the Opinion of Advocate General Tesauro in *Brasserie du pÊcheur and Factortame*, cited in footnote 9, points 98, 99 and 104, in particular footnote 104, in which the Advocate General explicitly referred to Paragraph 839(3) of the BGB. Dörr, C., 'Der gemeinschaftsrechtliche Staatshaftungsanspruch in der Rechtsprechung des Bundesgerichtshofs', *Deutsches Verwaltungsblatt*, 2006, p. 603, notes that the Third Civil Chamber of the Bundesgerichtshof viewed it in principle as unobjectionable to apply to State liability claims under Community law the legal concepts of contributory fault and the requirement to invoke legal remedies in order to avert loss and damage which are inherent in Paragraphs 254 and 839(3) of the BGB.

2. Reasonableness of pursuing primary legal protection

126. Nor does any alternative conclusion result from an examination of the judgment in *Metallgesellschaft and Others* [82] which simply took account of the special features of that case and in which the Court in essence qualified its previous case-law to mean that an injured party may not be referred to possibilities for legal protection which are of no assistance to his claim.

127. In my opinion, the judgment in *Metallgesellschaft and Others* supplements that in *Brasserie du pêcheur and Factortame*, by incorporating a feature on the 'reasonableness of primary legal protection'. To that extent, it reflects the argument advanced — in my view, correctly — by the German [83] and Czech [84] Governments and by the claimant, [85] according to which in the interests of effectiveness the injured party may not be required to avail himself of all possibilities for legal protection whether or not, having regard to all the circumstances of the case, their utilisation appears reasonable.

82 — In Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 106, the Court held that the exercise of rights conferred on private persons by directly applicable provisions of Community law would, however, be rendered impossible or excessively difficult if their claims for restitution or compensation based on Community law were rejected or reduced solely because the persons concerned had not applied for an advantage which national law denied them, with a view to challenging the refusal of the Member State by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law. This finding may be explained by the fact that in that case an alternative legal remedy would not have enabled the claimant in the main proceedings to avert or limit the loss and damage.

83 — Written observations of the German Government, paragraph 185.

84 — Written observations of the Czech Government, paragraph 38.

85 — Written observations of the claimant in the main proceedings, paragraph 275.

3. The assessment of reasonableness in cases where a preliminary reference is necessary or Treaty infringement proceedings are pending

128. The further question raised as to whether it is unreasonable to expect an injured party to seek primary legal protection in cases where the relevant court is unlikely to be capable of determining the Community law issues concerned without submitting a reference to the Court under Article 234 EC or where Treaty infringement proceedings under Article 226 EC are already pending must be assessed in the light of my comments on the third question.

129. As I have already argued in that connection, [86] on grounds of their specific function as a mechanism for general judicial review in the public interest, Treaty infringement proceedings under Article 226 EC may not be regarded as 'legal protection' in a strict sense. [87] Consequently, neither the lodging of a complaint with the Commission nor the initiation of Treaty infringement proceedings by it is capable of taking the place of the exercise of primary legal protection. Therefore, it is not unreasonable to expect an injured party to avail himself of primary legal protection when Treaty infringement proceedings under Article 226 EC are pending.

130. A qualified assessment must be given with regard to the pursuit of primary legal protection when it is probable that the national court will make a reference under Article 234 EC. Here, the question of whether a matter should be referred will generally arise in the framework of proceedings at a national level capable of conferring primary legal protection. However, the effectiveness of that legal protection is not reduced by the fact that the national court may submit a reference for a preliminary ruling to the Court of Justice. Rather, in my view, the opposite is the case. The preliminary ruling procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them. [88]

131. Moreover, in addition to its function of protecting the unity of law, the preliminary ruling procedure is also of overriding importance for individual legal protection because it ensures the practical effects of the rights which Community law confers on individuals. [89] The fundamental structural

86 — Points 98 to 101 of this Opinion.

87 — Preiß-Jankowski, M., 'Die gemeinschaftsrechtliche Staatshaftung im Lichte des Bonner Grundgesetzes und des Subsidiaritätsprinzips', *Juristische Schriftenreihe*, Volume 94, Bremen, 1997, p. 88, considers that the effectiveness of individual legal protection actually demands an explicit judgment in Treaty infringement proceedings to be foregone. This follows from the fact that, first, the initiation of such proceedings is not in the hands of an individual and, second, such proceedings would substantially delay the procedure for obtaining reparation.

88 — See, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20.

89 — Wegener, B., in Calliess, C. and Ruffert, M. (eds), cited above in footnote 7, Article 234, point 1.

principles of the supremacy and direct effect of Community law and the concept of State liability under Community law at issue in the main proceedings were developed in response to references made by national courts. To that extent, the argument advanced by the Polish and Czech Governments must be supported, according to which the likelihood of a reference being made to the Court may not in itself constitute sufficient grounds on which to conclude that is unreasonable to require the utilisation of a legal remedy.

VII — Conclusion

132. On the basis of the foregoing considerations I propose that the Court should reply to the Bundesgerichtshof's request for a preliminary ruling as follows:

(1) Article 5(1)(o) and Article 6(1)(b)(iii) of Directive 64/433 as reenacted by Directive 91/497, in conjunction with Article 5(1), Article 7 and Article 8 of Directive 89/662, do not place producers and distributors of pigmeat in a legal position which could give rise to a claim seeking to establish State liability under Community law in the event of errors of transposition or application.

(2) The Danish producers and distributors of pigmeat may rely on an infringement of the rules on the free movement of goods under Article 28 EC in order to substantiate a claim seeking to establish State liability under Community law. However, it is for the national court to determine whether an infringement of provisions of directives which do not grant individual rights results in an infringement of the rights of citizens of the Union to market access established by Article 28 EC.

(3) Neither the Community law principles on liability of the Member States nor Article 226 EC require the limitation period laid down in domestic law for a claim seeking to establish State liability under Community law to be interrupted if Treaty infringement proceedings under Article 226 EC are commenced or to be suspended pending the end of those proceedings.

(4) Community law as it currently stands does not require that the limitation period for a State liability claim under Community law which is based on the inadequate transposition of a directive and an accompanying (de facto) import ban commences only with full transposition of the directive.

(5) Community law does not preclude a rule of national law under which an individual may not demand reparation for loss and damage if he has wilfully or negligently failed to avert the loss or damage by utilising an alternative legal remedy, even if the court hearing the claim for that remedy probably would have been incapable of answering the Community law questions at issue without a reference to the Court of Justice or if Treaty infringement proceedings were already pending.